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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

LAURENCE H. FROMMHAGEN, *Petitioner,*

vs.

JAMES D. HODGSON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner, Laurence H. Frommhagen, respectfully prays that a writ of certiorari issue to review an action of dismissal of an appeal by the United States Court of Appeals for the Ninth Circuit on June 12, 1972. A timely petition for a rehearing was denied on July 7, 1972.

OPINIONS BELOW

The orders of dismissal of the Court of Appeals for the Ninth Circuit are shown in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner seeks to invoke an exercise of this Court's

power of supervision pursuant to Rule 19(1)(b) as to a departure from the accepted and usual course of judicial proceedings. This petition is filed within ninety days after the entry of the denial of the petition for rehearing.

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit act in a proper fashion by sequestering the entire record of an action not under appeal without stipulation of the parties, motion of a party or any showing by a party.

STATEMENT OF THE CASE

In March of 1969 Frommhagen filed a complaint in the District Court for the Northern District of California in which it was alleged that petitioner was denied unemployment compensation for the reason that he was appealing his dismissal from the National Aeronautics and Space Administration (NASA) to that agency and that NASA had not provided the state authorities with sufficient reasons for the dismissal action to enable an expeditious and just determination of eligibility for unemployment compensation. That civil action, No. 50924, was dismissed *without prejudice* by the Honorable Alfonso J. Zirpoli on September 3, 1971. Petitioner appealed that dismissal, but subsequently withdrew the appeal and resubmitted the complaint to the District Court which again alleged that NASA was continuing its refusal to provide the necessary information to the state authorities. The latter action, No. 72-222 (the Honorable Alfonso J. Zirpoli presiding) is still before that court.

On May 25, 1971, Frommhagen filed a complaint in the District Court for the Northern District of California. In that civil

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action, No. 71-967, petitioner sought to have declared unconstitutional 5 U.S.C. 8506(a) which provides that the findings of the federal employing agency are final and conclusive and are binding upon state authorities in the determination of eligibility for unemployment compensation. The Honorable Robert H. Schnacke dismissed *with prejudice* that action on September 1, 1971, and petitioner immediately appealed that judgment. The record on appeal, as designated by petitioner and the United States Attorney, consisted entirely of the record in that action and was filed according to the rules of the court.

Soon after that filing the United States Attorney, who, a few days earlier, had requested the Court in Civil Action 72-222 to take judicial notice of the record in the antecedant action No. 50924, prevailed upon the clerk of the court without a stipulation of petitioner or notification of petitioner or order of the District Court or Court of Appeals, to transmit the entire record of Civil Action No. 50924, including the originals and all copies, to the Court of Appeals for the Ninth Circuit as a supplemental record in the appeal to the dismissal of Civil Action 71-967.

Despite several pleas from petitioner to the United States Attorney and to the Court of Appeals, that entire record of Civil Action No. 50924, even though it was needed in the district court in Civil Action No. 72-222, was sequestered in the file room of the Court of Appeals. The only answer of the Court of Appeals to petitioner's pleas was a brief order directing that the record be held pending a decision by the panel which would pass upon the merits of the case. At no time did the United States Attorney file a motion requesting that the record be augmented with the record in Civil Action No. 50924 and at no time did the United States Attorney make any showing either to petitioner or to the Court of any reason why the record should be so augmented.

At the same time the Court of Appeals for the Ninth Circuit had entered an opinion in Appeals No. 25391, which bore upon other aspects of petitioner's dismissal from NASA, even though petitioner and the United States Attorney, at the behest of the Court of Appeals, had agreed that said appeal should be dismissed. Frommhagen had desired to put the issues in that appeal before the Court of Claims but is now prevented from doing so by the opinion of the Court of the Appeals for the Ninth Circuit which not only was adverse to petitioner but which rendered opinions, in the belief of petitioner, which were not presented for review to the Court of Appeals by either party. At the oral argument in that appeal, at which petitioner appeared *pro se*, the Court made several statements which were clearly hostile to the petitioner and contemptuous of the petitioner's person.

Fearful that the Court of Appeals would decide issues in Civil Action No. 50924, which were again before the District Court in Civil Action No. 72-222, Frommhagen took the position that he would not file the Appellant's Opening Brief until the record in Civil Action No. 50924 was returned to the District Court or the Court of Appeals gave some assurances that only the one issue in Civil Action No. 71-967, namely the constitutionality of 5 U.S.C. 8506(a), would be considered by the Court of Appeals.

The Court of Appeals without responding to petitioner's representations issued an order which had the effect of dismissing the appeal, and thereafter returned the record in Civil Action No. 50924 to the district court where it is now included in the record of Civil Action 72-222.

REASONS FOR GRANTING THE WRIT

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THE SEQUESTERING OF THE RECORD IN AN ACTION NOT UNDER APPEAL, WITHOUT STIPULATION OF PARTIES, MOTION OF A PARTY OR ANY SHOWING BY A PARTY, WAS IMPROPER

Rule 10(e) of the Federal Rules of Appellate Procedure clearly states that record in any appeal may not be supplemented unless stipulated to by the parties or ordered by the district court or court of appeals.

Petitioner has been unable to find any precedent, or indeed any published case, wherein it was held that the court of appeals did or did not have the authority to receive and store a record of an action not under appeal without stipulation of the parties or a showing of a party as to the need for supplementing the record.

Not only did this action by the Court of Appeals for the Ninth Circuit, particularly in the absence of any response to petitioner's representations to that Court of Appeals, generate justifiable fear in the mind of petitioner that the Court would extend its examination to other issues, but it placed an unnecessary financial burden on petitioner in the sense that the photostating of the voluminous record of Civil Action No. 50924 at fifty cents a page by the clerk of the Court of Appeals for submission to the district court would amount to a goodly sum of money.

Frommhagen respectfully submits that the action of the Court of Appeals for the Ninth Circuit not only was a violation of Rule 10(e) of that Court, but also was arbitrary and capricious, particularly when viewed in the light of that Court's refusal to honor an agreement between Frommhagen and the United States Attorney to dismiss another appeal before that

Court and that Court's adjudication in the aforementioned appeal of issues not presented for review.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the improper and capricious conduct of the Court of Appeals for the Ninth Circuit which led to an unjust dismissal of the appeal.

Dated, Santa Cruz, California
October 1, 1972

Respectfully submitted,
LAURENCE FROMMHAGEN,
Pro Se

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 71-3066

Laurence Frommhagen,
Plaintiff-Appellant,
vs.
James D. Hodgson, Secretary
of Labor,
Defendant-Appellee.

[June 6, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and HUFSTEDLER, Circuit Judges

Appellant's motion to supplement the record by filing a transcript of the district court proceedings held on September 1, 1971, is granted.

The court reaffirms its order of May 22, 1972, that the appeal will stand dismissed for want of prosecution on June 12, 1972, if appellant's opening brief has not been filed on or before that date.

United States Court of Appeals
for the Ninth Circuit

No. 71-3066

Laurence Frommhagen,
Plaintiff-Appellant,

vs.

James D. Hodgson, Secretary
of Labor,
Defendant-Appellee.

[May 22, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and HUFSTEDLER, Circuit Judges

Appellant is allowed until June 12, 1972, to file his opening brief. If appellant has not filed his opening brief on or before June 12, 1972, the appeal will stand dismissed for want of prosecution on that date.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 71-3066 LAURENCE H. FROMMHAGEN VS. JAMES D. HODGSON, ETC.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-12-72. Appeal dismissed for want of prosecution etc. the judgment or order of the court below (or administrative agency).

Under Rule 40 you have 14 days to file a petition for rehearing. Unless such a petition is filed or the court otherwise orders, the mandate will issue 21 days from today, Rule 41(a). A petition for rehearing must comply with Rules 32(b) and 40.

Very truly yours,

William B. Luck,
Clerk of Court

United States Court of Appeals
for the Ninth Circuit

No. 71-3066

Laurence Frommhagen,
Plaintiff-Appellant,

vs.

James D. Hodgson, Secretary
of Labor,
Defendant-Appellee.

[October 5, 1972]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and HUFSTEDLER, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.